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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-104

Filed: 1 August 2017

Vance County, No. 16 E 7

IN THE MATTER OF:

THE ESTATE OF WILLIAM GARNER

Appeal by respondents from order entered 7 October 2016 by Judge Henry W. Hight, Jr., in Vance County Superior Court. Heard in the Court of Appeals 6 June 2017.

*Stainback, Satterwhite & Zollicoffer, PLLC, by Paul J. Stainback, for petitioner-appellee.*

*Larry E. Norman, Attorney, PLLC, by Larry E. Norman, for respondent-appellants.*

CALABRIA, Judge.

Where respondents failed to appeal a deficiency judgment in a timely manner, any subsequent attacks on the judgment are collateral attacks, and will not be entertained by this Court. Where respondents filed an answer to petitioner's motion

and appeared through counsel at a hearing on said motion, respondents waived any objections to defective service or summons. We affirm.

I. Factual and Procedural Background

On 29 December 2015, William H. Garner (“decendent”) died testate. On 14 January 2016, his daughters, Iris E. Garner and Angela G. Davis (collectively, “respondents”), filed an application for probate and letters testamentary. According to his will dated 2012, decedent left his estate (“the estate”) to his then-wife, Evelyn Garner (“Evelyn”); in the event Evelyn predeceased him, the estate was to be divided between respondents. In addition, decedent named Evelyn as executrix of his estate; in the event she predeceased him, respondents were to act as co-executrices. Since Evelyn predeceased decedent, respondents filed an affidavit in Vance County Superior Court as co-executrices, and the Vance County Clerk of Court ordered letters to be issued accordingly.

On 2 February 2016, Joan H. Lawrence (“petitioner”), who had married decedent subsequent to Evelyn’s death, filed an application for the assignment of a year’s allowance, seeking \$30,000 as a surviving spouse. That same day, the Clerk of Court entered a deficiency judgment against the estate in petitioner’s favor, in the amount of \$30,000.

On 11 February 2016, petitioner filed a motion to claim an elective share of the estate. In this motion, petitioner alleged that she married decedent on 22 May 2015,

that decedent died on 29 December 2015, and that decedent's will, executed in 2012, left no provision for petitioner. Petitioner therefore sought 15% of the total net assets of the estate as an elective share.

On 25 July 2016, petitioner filed a motion seeking the removal of respondents as co-executrixes. In this motion, petitioner alleged that respondents filed a 90-day inventory of the estate which was "absolutely incorrect and fail[ed] to adequately report all assets of the Estate[,]" that respondents filed false claims against the estate "to diminish the value of the Estate . . . for purposes of diminishing the value of the elective share sought by the Petitioner[,]" that respondents seized decedent's property from petitioner's residence but did not report that property as part of the estate, and that respondents had not yet disbursed the \$30,000 allowance authorized by the Clerk of Court. Petitioner therefore sought the removal of respondents as co-executrixes, the appointment of a suitable executor, the disbursement of \$30,000 from the estate, a freezing of the estate's assets, and an order of contempt against respondents. On that same day, the Clerk of Court entered an order on petitioner's motion, freezing the estate's assets, and scheduling a hearing date to show cause why respondents should not be held in contempt and to consider the removal of respondents as co-executrixes.

On 17 August 2016, respondents filed a response to petitioner's 25 July 2016 motion, and a motion to stay the estate proceedings. This motion alleged that

respondents had filed an annulment action in Wake County, seeking to annul the marriage between decedent and petitioner “on the basis [of] undue influence exerted over the Deceased by [petitioner], lack of capacity of the Deceased, and impotence of the Deceased.” Because the determination of the annulment action was dispositive of petitioner’s right to a year’s allowance and elective share, respondents sought to stay the proceedings pending the separate action.

On 26 August 2016, the Clerk of Court entered an order on petitioner’s 25 July 2016 motion. In its order, the Clerk of Court found that the inventories and reports filed by respondents demonstrated discrepancies concerning amounts and sources of money, inappropriate reporting of the sale of personal property, and inappropriate placement of the proceeds from sales of personal property into respondents’ personal bank accounts. The Clerk of Court further found that respondents had filed several claims for payment by the estate “which evince[] a personal and private interest by the Co-Executrixes regarding the administration of said estate, and that some have been paid without approval or justification by the Court.” The Clerk of Court went on to observe that it had “a number of questions relating to bills which have been paid by the Co-Executrixes[,]” and that some of the checks paid by respondents as co-executrixes “were paid for . . . inappropriate purposes, and that some were even made payable to ‘cash’ for ‘reimbursements’ to the Co-Executrixes which have not been approved by the Court[.]” The Clerk of Court further found that respondents filed a

motion to stay the proceedings, but that petitioner objected to this motion on the grounds that “the Court does not have subject matter jurisdiction pursuant to NCGS 28A-2-4 to issue a stay pending the outcome of a pending matter in another county,” and that “said motion was not heard by the undersigned because it was not timely filed[.]”

The Clerk of Court therefore granted petitioner’s motion to remove respondents as co-executrixes, ordered the appointment of a new executor, ordered that the estate remain frozen until the new executor was properly appointed, required respondents to provide an accounting of their time as co-executrixes, and reaffirmed that petitioner was entitled to her year’s allowance.

Respondents appealed this matter to the Superior Court of Vance County. On 7 October 2016, the trial court entered an order on appeal, affirming the order of the Clerk of Court.

From the order of the Superior Court of Vance County, respondents appeal.

## II. Standard of Review

On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court. When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test. In doing so, the trial judge reviews the Clerk’s findings and may either affirm, reverse, or modify them. If there is evidence to support the findings of the Clerk, the judge must affirm. Moreover, even though the Clerk may have made an

erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings. The standard of review in this Court is the same as in the Superior Court.

*Matter of Estate of Pate*, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3 (1995) (citations and quotation marks omitted).

### III. Clerk of Court's Order

Respondents make multiple arguments, but all essentially boil down to two issues: whether the Clerk of Court erred in assigning a year's allowance to petitioner, and whether the Clerk of Court erred in removing and replacing respondents as co-executrices of the estate.

#### A. Assignment of Allowance

First, respondents contend that the trial court erred in assigning a year's allowance to petitioner. We disagree.

Respondents allege that petitioner and the Clerk of Court failed to comply with the appropriate procedures for claiming a year's allowance. This procedure is outlined in our General Statutes.

First, a surviving spouse may apply for a year's allowance to the executor of the will or administrator of the estate. If the allowance is not disbursed after ten days, the surviving spouse may then apply to the Clerk of Court for the allowance. N.C. Gen. Stat. § 30-16 (2015). Respondents contend that petitioner's application,

filed directly with the Clerk of Court, violated this statutory procedure, that the subsequent and immediate assignment of the allowance by the Clerk of Court was erroneous, and that the trial court's decision to uphold that assignment was likewise erroneous.

Petitioner correctly notes, however, that respondents failed to appeal from the order of the Clerk of Court mandating the assignment of allowance. Respondents acknowledge that, pursuant to N.C. Gen. Stat. § 30-23 (2015), they had ten days to appeal the assignment, and failed to do so. They contend, however, that because they received no notice of assignment, they were unable to participate in the process.

The trial court, however, found that, on 2 February 2016, the same day that petitioner filed her application for assignment of year's allowance and the Clerk of Court entered a deficiency judgment for the assignment of allowance, "a copy of the awarding of said widow's allowance to [petitioner] was provided unto Pier Williamson, then counsel for the Estate of William H. Garner . . . by the mailing of said Order in a letter addressed to him . . . and that such gave adequate and due notice of such award to the Estate of William H. Garner and the Co-Executrixes thereof as required by the North Carolina Rules of Civil Procedure and by NCGS 30-23." This finding is supported by evidence in the record, namely an e-mail from respondents' attorney to the Clerk of Court. In this e-mail, the attorney notes that respondents "did not file an appeal of the award [of year's allowance] because they

were not advised to do so by their prior attorney.” This suggests that respondents were aware of the award, notwithstanding their contentions to the contrary, and that they simply declined to appeal.

Since respondents did not timely appeal the order of the Clerk of Court, any arguments with respect to it constitute a collateral attack. “ ‘A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.’ ” *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (quoting *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969)). “North Carolina does not allow collateral attacks on judgments.” *Id.* (quoting *Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003)). Because respondents cannot challenge the trial court’s decision to enforce the deficiency judgment without challenging the deficiency judgment itself, and respondents lost the opportunity to challenge that judgment due to untimely action, we hold that any attack on the deficiency judgment or award of a year’s allowance is a collateral attack, and decline to entertain it.

Respondents further argue that the matter should have been stayed pending the outcome of their separate proceeding in another county to have petitioner’s marriage to the decedent annulled. However, the order of the Clerk of Court notes that respondents’ motion for stay was untimely, and respondents do not challenge

that fact. Indeed, the record shows that respondents' motion for stay was filed on 17 August 2016, the same day that the hearing was held before the Clerk of Court. Accordingly, the Clerk of Court was not obligated to grant respondents' untimely motion, nor did the trial court err in upholding the decision of the Clerk of Court.

B. Removal of Executrixes

Next, respondents contend that the trial court erred in removing them as executrixes. We disagree.

Our general statutes outline the circumstances under which an administrator, executor, or personal representative may be removed from that role. First, letters testamentary may be revoked after a hearing when “[t]he person to whom they were issued has violated a fiduciary duty through default or misconduct in the execution of the person’s office[.]” N.C. Gen. Stat. § 28A-9-1(a)(3) (2015). Then, “[u]pon the verified petition of any person interested in the estate for an order finding that any of the grounds set forth in subsection (a) of this section exist with regard to any personal representative or collector within the jurisdiction of the clerk of superior court, the clerk shall conduct a hearing in accordance with Article 2 of this Chapter.” N.C. Gen. Stat. § 28A-9-1(b)(2).

In the instant case, on 25 July 2016, petitioner filed a verified motion seeking, *inter alia*, the removal of respondents as co-executrixes of the estate. This motion specifically alleged that respondents' conduct constituted a “direct violation of the

responsibilities imposed upon [respondents] by the Court and in conformity with the laws of the State of North Carolina,” that their actions were “direct and willful,” that they were “not acting in the best interest and general welfare of the Estate[.]” and that their actions “constitute abuse of their discretion and of the authority imposed upon them pursuant to their oath to properly administer the Estate[.]”

In response to this motion, the Clerk of Court ordered a hearing “for purposes of hearing the motion of the Petitioner to remove [respondents] as Co-Executrixes of the Estate of William H. Garner for cause[.]” Respondents were ordered to “show just cause, if any there be, as to why the relief sought by the Plaintiff in a motion heretofore filed in the above-captioned matter should not be granted[.]” This notice was served upon respondents’ attorney by mail. A separate notice of hearing likewise issued. Respondents clearly received the motion and notice, as they filed a response and motion to stay on 17 August 2016, the day of the hearing before the Clerk of Court.

Respondents contend that they were not properly served. This is easily disproven, as the record demonstrates that petitioner’s motion to remove respondents, the Clerk of Court’s order, and the notice of hearing were all served upon respondents’ counsel, Pier Williamson. Although respondents were represented by another attorney at the hearing, Pier Williamson signed respondents’ application for probate and letters testamentary as attorney of record. We have held that, where

an attorney appears in a matter on behalf of a party, service upon that attorney is effective. *See Beck v. Beck*, 64 N.C. App. 89, 93, 306 S.E.2d 580, 583 (1983) (holding that “[a]n attorney who generally handles the legal affairs for an individual is not an agent of that person for the service of process *unless* he makes an appearance in the lawsuit for him”).

Further, respondents filed an answer to petitioner’s motion, and were represented by counsel at the hearing. Although the parties were not personally present, “it has long been the rule in this jurisdiction that a general appearance by a party’s attorney will dispense with process and service.” *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980). Indeed, our Supreme Court has long held that objections to purportedly defective service are “waived by an answer or a general appearance.” *McDonald v. MacArthur Bros. Co.*, 154 N.C. 122, 125, 69 S.E. 832, 833 (1910). We therefore hold that, even assuming *arguendo* that service was ineffective, respondents waived any defect by responding to the motion and appearing at the hearing.

Respondents nonetheless contend that the Clerk of Court lacked jurisdiction, due to the fact that petitioner never filed a proper complaint or summons to initiate the action. However, our Supreme Court has addressed this issue:

Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. Generally, such deficiencies can be cured. Even

without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction.

*In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009) (citations omitted). As previously mentioned, respondents filed a response to petitioner's motion and appeared at the hearing. No transcript of the hearing is included in the record, and there is no evidence in the record that respondents objected to personal jurisdiction before the Clerk of Court. Certainly, respondents' answer failed to raise any objection to personal jurisdiction. As such, we hold that respondents' appearance through counsel constituted a waiver of personal jurisdiction, curing any defect resulting from a lack of summons.

Respondents further take issue with the timing of the hearing, noting that the notice, which issued on 25 July 2016, referenced a hearing date of 2 August 2016. Notwithstanding this admittedly narrow window, the order of the Clerk of Court indicates that the hearing actually occurred on 17 August 2016, not 2 August 2016. As such, respondents' argument as to the narrow window of time necessarily fails.

Given all of these facts, we hold that the Clerk of Court had proper jurisdiction to remove respondents as co-executrixes, and the trial court did not err in upholding that determination.

**AFFIRMED.**

Judges BRYANT and STROUD concur.

IN RE: GARNER

*Opinion of the Court*

Report per Rule 30(e).